

Aug 29, 2019

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TINA MARIE H.,

Plaintiff,

v.

ANDREW M. SAUL
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

No. 2:18-CV-00230-JTR

ORDER GRANTING, IN PART,
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
REMANDING FOR ADDITIONAL
PROCEEDINGS

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 13, 14. Attorney Dana Madsen represents Tina H. (Plaintiff); Special Assistant United States Attorney Michael Howard represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, IN PART**, Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and

¹ Andrew M. Saul is now the Commissioner of the Social Security Administration. Accordingly, the Court substitutes Andrew M. Saul as the Defendant and directs the Clerk to update the docket sheet. *See* Fed. R. Civ. P. 25(d).

1 **REMANDS** the matter to the Commissioner for additional proceedings pursuant to
2 42 U.S.C. § 405(g).

3 **JURISDICTION**

4 Plaintiff filed an application for Disability Insurance Benefits on July 29,
5 2015, alleging disability since June 1, 2015, due to degenerative disc disease,
6 osteoarthritis, rheumatoid arthritis, sciatica, and nerve damage in her shoulder. Tr.
7 419-20, 458. The application was denied initially and upon reconsideration. Tr.
8 346-49, 351-53. Plaintiff filed a concurrent application for Supplemental Security
9 Income on June 1, 2016. Tr. 423-30. Administrative Law Judge (ALJ) Jesse
10 Shumway held a hearing on May 17, 2017, Tr. 269-311, and issued an unfavorable
11 decision on July 21, 2017, Tr. 16-27. Plaintiff requested review from the Appeals
12 Council. Tr. 418. The Appeals Council denied Plaintiff's request for review on
13 May 24, 2018. Tr. 1-6. The ALJ's July 2017 decision thus became the final
14 decision of the Commissioner, which is appealable to the district court pursuant to
15 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on July 23, 2018.
16 ECF No. 1.

17 **STATEMENT OF FACTS**

18 Plaintiff was born in 1972 and was 42 years old as of her alleged onset date.
19 Tr. 25. She has a GED and completed some college courses. Tr. 285. Her work
20 history consisted primarily of dog grooming. Tr. 285-86.

21 In June 2015, Plaintiff was in a serious motorcycle accident, resulting in
22 several fractures and necessitating multiple surgeries on her right shoulder. Tr.
23 286-87. She was in the hospital for several weeks and was in a wheelchair for a
24 month. Tr. 1257. In the wake of her injuries and altered physical capabilities, she
25 began to experience depression and anxiety. Tr. 856, 1060-61.

26 **STANDARD OF REVIEW**

27 The ALJ is responsible for determining credibility, resolving conflicts in
28 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,

1 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with
2 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
3 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
4 only if it is not supported by substantial evidence or if it is based on legal error.
5 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
6 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at
7 1098. Put another way, substantial evidence is such relevant evidence as a
8 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*
9 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one
10 rational interpretation, the Court may not substitute its judgment for that of the
11 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*,
12 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the
13 administrative findings, or if conflicting evidence supports a finding of either
14 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*
15 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision
16 supported by substantial evidence will be set aside if the proper legal standards
17 were not applied in weighing the evidence and making the decision. *Browner v.*
18 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

19 SEQUENTIAL EVALUATION PROCESS

20 The Commissioner has established a five-step sequential evaluation process
21 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
22 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through
23 four, the burden of proof rests upon the claimant to establish a prima facie case of
24 entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is
25 met once a claimant establishes that a physical or mental impairment prevents the
26 claimant from engaging in past relevant work. 20 C.F.R. §§ 404.1520(a)(4),
27 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds
28 to step five, and the burden shifts to the Commissioner to show (1) the claimant

1 can make an adjustment to other work; and (2) the claimant can perform specific
2 jobs that exist in the national economy. *Batson v. Commissioner of Social Sec.*
3 *Admin.*, 359 F.3d 1190, 1193-1194 (2004). If a claimant cannot make an
4 adjustment to other work in the national economy, the claimant will be found
5 disabled. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

6 ADMINISTRATIVE DECISION

7 On July 21, 2017, the ALJ issued a decision finding Plaintiff was not
8 disabled as defined in the Social Security Act.

9 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
10 activity since June 1, 2015, the alleged onset date. Tr. 19.

11 At step two, the ALJ determined Plaintiff had the following severe
12 impairments: chronic rotator cuff tears of both shoulders, myofascial pain
13 syndrome/fibromyalgia, obesity, lumbar spine degenerative disc disease,
14 schizophrenia, major depressive disorder, generalized anxiety disorder, and
15 borderline personality disorder. *Id.*

16 At step three, the ALJ found Plaintiff did not have an impairment or
17 combination of impairments that met or medically equaled the severity of one of
18 the listed impairments. Tr. 19-20.

19 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found
20 she could perform sedentary exertion level work with the following limitations:

21 she can never climb ladders, ropes, or scaffolds or crawl; she can
22 perform other postural activities occasionally; she can never reach
23 overhead bilaterally and, with the right upper extremity, can reach
24 only occasionally in all other directions; she can have no exposure to
25 vibration or hazards (i.e., unprotected heights, moving mechanical
26 parts); she is limited to unskilled and well-learned semi-skilled tasks
27 in a routine, predictable work environment with no more than
28 occasional changes; she can have only occasional contact with the
public, supervisors, and coworkers; and she would likely be off task
up to 5% of the workday.

1 Tr. 21.

2 At step four, the ALJ found Plaintiff was unable to perform her past relevant
3 work as a dog groomer or secretary. Tr. 25.

4 At step five, the ALJ determined that, based on the testimony of the
5 vocational expert, and considering Plaintiff's age, education, work experience, and
6 RFC, Plaintiff was capable of making a successful adjustment to other work that
7 existed in significant numbers in the national economy, including the jobs of nut
8 sorter and call-out operator. Tr. 25-26.

9 The ALJ thus concluded Plaintiff was not under a disability within the
10 meaning of the Social Security Act at any time from June 1, 2015, the alleged
11 onset date, through the date of the ALJ's decision, July 21, 2017. Tr. 26-27.

12 ISSUES

13 The question presented is whether substantial evidence supports the ALJ's
14 decision denying benefits and, if so, whether that decision is based on proper legal
15 standards.

16 Plaintiff contends the ALJ erred by (1) improperly rejecting Plaintiff's
17 subjective statements; (2) improperly rejecting medical opinion evidence; and (3)
18 making improper step five findings.²

19 DISCUSSION

20
21 ² Plaintiff also alleges for the first time in her Reply Brief that the ALJ
22 deprived her of due process by failing to admit evidence submitted after the
23 hearing. ECF No. 15 at 3-4. Because this issue was not raised in the Opening
24 Brief, it is waived. *Independent Towers of Wash. v. Wash.*, 350 F.3d 925, 929 (9th
25 Cir. 2003); *Greenwood v. Fed. Aviation Admin.*, 28 F.3d 971, 977 (9th Cir. 1994).
26 However, as the claim is being remanded on other bases, Plaintiff will have the
27 opportunity to complete the record and submit all relevant evidence for the ALJ's
28 consideration.

1 **1. Plaintiff’s subjective statements**

2 Plaintiff contends the ALJ erred by improperly rejecting her subjective
3 statements. ECF No. 13 at 17-18.

4 It is the province of the ALJ to make credibility determinations. *Andrews v.*
5 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ’s findings must be
6 supported by specific, cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231
7 (9th Cir. 1990). Once the claimant produces medical evidence of an underlying
8 medical impairment, the ALJ may not discredit testimony as to the severity of an
9 impairment merely because it is unsupported by medical evidence. *Reddick v.*
10 *Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Absent affirmative evidence of
11 malingering, the ALJ’s reasons for rejecting the claimant’s testimony must be
12 “specific, clear and convincing.” *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir.
13 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). “General findings are
14 insufficient: rather the ALJ must identify what testimony is not credible and what
15 evidence undermines the claimant’s complaints.” *Lester*, 81 F.3d at 834; *Dodrill v.*
16 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

17 The ALJ concluded Plaintiff’s medically determinable impairments could
18 reasonably be expected to cause some of her alleged symptoms; however,
19 Plaintiff’s statements concerning the intensity, persistence and limiting effects of
20 those symptoms were not entirely consistent with the medical evidence and other
21 evidence of record. Tr. 22. The ALJ offered the following reasons for
22 disregarding Plaintiff’s subjective symptoms: (1) the objective medical evidence
23 did not support the extent of the alleged impairment; (2) Plaintiff’s condition
24 improved following surgery, allowing her to resume some work activity; (3)
25 treatment notes reflected Plaintiff’s willingness to create a picture of disability
26 despite work activity; (4) her daily activities suggested greater functioning than
27 alleged; and (5) Plaintiff’s presentation with respect to her mental health
28 impairments was less than remarkable. Tr. 22-24. Plaintiff contends the ALJ erred

1 in this analysis, and that a fair reading of the record does not support the findings.
2 ECF No. 13 at 17-18. Defendant argues the ALJ gave clear and convincing
3 reasons for discounting Plaintiff's testimony, and that his discussion is a
4 reasonable interpretation of the evidence.

5 *A. Improvement and resuming work*

6 In discussing Plaintiff's allegations, the ALJ noted that, following her 2016
7 surgery, Plaintiff experienced some improvement and resumed a degree of work
8 activity that suggested a greater physical capability than alleged. Tr. 23. He noted
9 she had resumed grooming dogs and was doing some work for the management of
10 her trailer park. *Id.* The record does not support a finding that this minimal work
11 activity was in any way inconsistent with Plaintiff's alleged impairments.

12 In May 2016 Plaintiff had the hardware removed from her right shoulder and
13 underwent a debridement. Tr. 1146. In the following weeks, she was noted to be
14 doing well post-procedure, and in June she reported that she had increased ability
15 to tend to her own hygiene, as well as being able to groom a dog again. Tr. 1140.
16 In July she reported her shoulder was getting better to some degree and she was
17 able to groom more dogs and feel productive. Tr. 1133. In the following months,
18 there were a few notes in the treatment records of her continuing to groom dogs for
19 extra cash. Tr. 1264, 1266, 1276. These records contain no information as to how
20 many dogs she was regularly caring for. By the hearing, Plaintiff reported the
21 most she had done in the past year was three dogs in one week. Tr. 276. She
22 testified she mostly used her left arm, and was only grooming very small dogs,
23 other than her own poodles. 287-89. In a post-hearing letter, Plaintiff clarified that
24 she was mostly tending to family members' dogs, and that her rate of working was
25 substantially reduced from that of a professional. Tr. 562. The ALJ's conclusion
26 that this minimal activity in some way demonstrates an inconsistency with her
27 reports is not supported by substantial evidence.

1 Similarly, Plaintiff's work for her trailer park was so minimal as to
2 constitute no more than a scintilla of evidence. She testified she worked in the
3 office in exchange for a break on her rent, and that the position was only for a
4 couple of hours for a few weeks. Tr. 276-77. She attempted to clean out a trailer
5 one time and was unable to do many of the things requested of her. Tr. 277. These
6 facts do not detract from Plaintiff's allegations of pain and disability.

7 Substantial evidence does not support the ALJ's conclusion that Plaintiff's
8 functioning improved to a point of allowing her to return to any significant work
9 activity that detracts from her symptom reports.

10 *B. Willingness to create a picture of disability*

11 The ALJ found that some of Plaintiff's statements raised "a serious
12 question" about whether her disability claim was genuine, pointing to her work
13 activity and a treatment note indicating she was "willing to create a picture of
14 disabled" in spite of her work activity. Tr. 23. As addressed above, Plaintiff's
15 work activity was minimal and does not indicate any inconsistency with her
16 allegations of disability, much less an ability to work in a full-time capacity.
17 Furthermore, the ALJ inaccurately attributed the statements about creating a
18 picture of disability to Plaintiff, as opposed to the medical provider who was
19 actually the source of the statement. Tr. 1300. At best, the treatment note
20 indicates the provider's skepticism as to whether Plaintiff qualified for disability,
21 given her ongoing work activity. Tr. 1300. However, as noted, the work for the
22 trailer park did not last past a few weeks, and there is no indication of substantial
23 work grooming dogs. The passing remark by Plaintiff's treating counselor does
24 not undermine Plaintiff's reports, and does not reflect a statement by Plaintiff, as
25 presumed by the ALJ. This does not constitute a clear and convincing reason for
26 discounting her allegations.

27 *C. Daily activities*
28

1 A claimant's daily activities may support an adverse credibility finding if the
2 claimant's activities contradict her other testimony. *Orn v. Astrue*, 495 F.3d 625,
3 639 (9th Cir. 2007). However, the mere fact that a claimant is capable of
4 performing some basic daily activities needed for everyday survival does not
5 necessarily detract from her overall credibility. *Garrison v. Colvin*, 759 F.3d 995,
6 1016 (9th Cir. 2014); *Benecke v. Barnhart*, 379 F.3d 587, 594 (9th Cir. 2004).

7 The ALJ noted Plaintiff continued to engage in activities that indicated
8 greater functioning than alleged. Tr. 23. Specifically, he noted Plaintiff's ability
9 to prepare meals, do some household chores, do needle work, shop in stores, drive
10 a vehicle, and sign up for online classes. *Id.* The ALJ failed to explain how any of
11 these activities are inconsistent with Plaintiff's pain allegations. Plaintiff never
12 claimed to be completely unable to tend to personal care or household activities,
13 just that she needed assistance with some actions and when she did chores it took
14 her much longer than before her injuries, with having to find ways to compensate
15 for her diminished capabilities. Tr. 294-98, 522-23, 961, 973, 1063, 1069, 1140,
16 1141. She testified that she did her own cooking, but mainly had premade meals.
17 Tr. 298, 523. Shopping took her three times as long as it used to. 524. By the
18 time of the hearing, her caregiver was doing the majority of her shopping. Tr. 301.
19 Her function report indicated that she could drive when she was feeling okay, but
20 sometimes she was not able to drive and needed someone to accompany her places.
21 Tr. 524-25. The record contains very little evidence regarding the demands of
22 Plaintiff's schooling, other than she thought taking some online classes was
23 something she could handle during her recovery. Tr. 1011, 1035. She indicated to
24 her treating providers that school had its own challenges apart from the physical
25 demands, and she was provided with a letter to support accommodations. Tr.
26 1015. Notably, in July 2016 Plaintiff was authorized additional state-provided
27 caregiving hours based on the assessment that her needs had increased. Tr. 1233.
28

1 The Ninth Circuit has repeatedly found that the ability to perform these
2 kinds of activities are not inconsistent with the inability to work:

3 We have repeatedly warned that ALJs must be especially cautious in
4 concluding that daily activities are inconsistent with testimony about pain,
5 because impairments that would unquestionably preclude work and all the
6 pressures of a workplace environment will often be consistent with doing
7 more than merely resting in bed all day.

8 *Garrison*, 759 F.3d at 1016; *see also Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir.
9 1989) (“[M]any home activities are not easily transferable to what may be the more
10 grueling environment of the workplace, where it might be impossible to
11 periodically rest or take medication.”). Because the ALJ failed to indicate how any
12 of the identified activities are inconsistent with Plaintiff’s pain and limitation
13 testimony, this does not constitute a clear and convincing reason for disregarding
14 her allegations.

15 *D. Objective medical evidence.*

16 Apart from the specific items discussed above, the ALJ found Plaintiff’s
17 pain complaints and alleged mental health symptoms to be unsupported by the
18 objective medical evidence. An ALJ may cite inconsistencies between a
19 claimant’s testimony and the objective medical evidence in discounting the
20 claimant’s symptom statements. *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d
21 1219, 1227 (9th Cir. 2009). But this cannot be the only reason provided by the
22 ALJ. *See Lester*, 81 F.3d at 834 (the ALJ may not discredit the claimant’s
23 testimony as to subjective symptoms merely because they are unsupported by
24 objective evidence). “[A]n ALJ does not provide specific, clear, and convincing
25 reasons for rejecting a claimant’s testimony by simply reciting the medical
26 evidence in support of his or her residual functional capacity determination.”
27 *Brown-Hunter v. Colvin*, 806 F.3d 487, 489 (9th Cir. 2015). With none of the
28

1 ALJ's other reasons rising to the clear and convincing standard, a lack of support
2 from the objective medical evidence alone does not suffice to satisfy the standard.

3 Because the ALJ failed to offer clear and convincing reasons for discounting
4 Plaintiff's subjective complaints, the decision is not supported by substantial
5 evidence. Upon remand, the ALJ shall re-evaluate Plaintiff's testimony and
6 reassess what statements, if any, are not consistent with the medical evidence and
7 other evidence in the record, and what specific evidence undermines those
8 statements.

9 **2. Medical opinion evidence**

10 Plaintiff argues the ALJ erred by improperly rejecting the opinion of
11 consultative examiner Amy Dowell, MD. ECF No 13 at 18-20.

12 Plaintiff underwent a consultative psychological exam with Dr. Dowell in
13 December 2015. Tr. 932-36. Dr. Dowell diagnosed Plaintiff with major
14 depressive disorder and generalized anxiety disorder, and opined she would have
15 difficulty with completing a normal workweek, dealing with workplace stress, and
16 performing work activities on a consistent basis. Tr. 935-36.

17 The ALJ accorded little weight to Dr. Dowell's opinion that Plaintiff would
18 not be able to sustain work activity, finding the one-time exam to be less than
19 persuasive for evaluating Plaintiff's longitudinal abilities, and found that the
20 evidence as a whole did not show substantiating signs that Plaintiff would not be
21 able to sustain work. Tr. 24. The ALJ noted multiple exams with normal attention
22 and concentration, and further acknowledged that Dr. Dowell's opinion was
23 offered only six months after Plaintiff's accident, when she was still in recovery.
24 Tr. 24-25.

25 When an examining physician's opinion is contradicted by another
26 physician, the ALJ is required to provide "specific and legitimate reasons" to reject
27 the opinion. *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995). The specific
28 and legitimate standard can be met by the ALJ setting out a detailed and thorough

summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). The ALJ did so here, offering a reasonable interpretation of the records.

However, because the claim is being remanded on other bases, the ALJ shall reconsider Dr. Dowell's opinion in evaluating the medical evidence as a whole.

3. Step five findings

Plaintiff asserts the ALJ's step five findings are not supported by substantial evidence because the RFC determination was improper. ECF No. 13 at 20.

Considering the case is being remanded for the ALJ to properly address Plaintiff's subjective symptom testimony, the ALJ will be required to make a new step five determination and call upon a vocational expert to provide testimony.

CONCLUSION

Plaintiff argues the ALJ's decision should be reversed and remanded for the payment of benefits. The Court has the discretion to remand the case for additional evidence and findings or to award benefits. *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). The Court may award benefits if the record is fully developed and further administrative proceedings would serve no useful purpose. *Id.* Remand is appropriate when additional administrative proceedings could remedy defects. *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989). In this case, the Court finds that further development is necessary for a proper determination to be made.

The ALJ's RFC determination is not supported by substantial evidence in this case and must be reevaluated. On remand, the ALJ shall reevaluate Plaintiff's subjective complaints and the medical record as a whole, formulate a new RFC, obtain supplemental testimony from a vocational expert, if necessary, and take into consideration any other evidence or testimony relevant to Plaintiff's disability claim.

Accordingly, **IT IS ORDERED:**

1 1. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is
2 **GRANTED, IN PART.**

3 2. Defendant's Motion for Summary Judgment, **ECF No. 14**, is
4 **DENIED.**

5 3. The matter is **REMANDED** to the Commissioner for additional
6 proceedings consistent with this Order.

7 4. An application for attorney fees may be filed by separate motion.
8 The District Court Executive is directed to file this Order and provide a copy
9 to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and
10 the file shall be **CLOSED.**

11 **IT IS SO ORDERED.**

12 DATED August 29, 2019.

A handwritten signature in black ink, appearing to be "M", is written above a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE